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Ik Ngi Piau & Anor v Tiong Meng Kwong

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(NCVC)(A)-1273–07 OF 2017
IDRUS HARUN, ZABARIAH YUSOF AND YEOH WEE SIAM JJCA
3 OCTOBER 2018

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Land Law — Caveat — Removal — Unregistered tenancy agreement — Whether there was a caveatable interest — Whether respondent may rely on unregistered tenancy agreement — Meaning of unregistered agreement under s 173 of the Land Code (Cap 81) — Whether caveat lodged by respondent ought to be removed — Land Code (Cap 81) ss 158 & 173

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This was in relation to an originating summons filed by the appellants applying for several declarations relating to a caveat instrument lodged by the respondent on a parcel of land together with the building thereon ('the said property') wherein the appellants applied for: (a) a declaration that the caveat instrument lodged by the respondent be declared null and void; (b) a declaration that the respondent had no caveatable interest on the said property; (c) a declaration that the said caveat was wrongful and or lodged without reasonable cause; and (d) compensation for damages sustained by the appellants for wrongful entry of the caveat. The facts of the case were that both the appellants were registered co-proprietors of the said property and they had entered into a tenancy agreement with the respondent for a period of five years, however the agreement was not registered with the relevant authority under the Land Code (Cap 81) ('the Land Code'). Subsequently the said property was damaged by fire and since then, the respondent had not paid the monthly rental to the appellants. About one and a half years after the fire the respondent proceeded to lodge a private caveat against the said property claiming to be beneficially interested in the said property by virtue of the tenancy agreement in question and forbade the registration of any transfer or other dealings until it was withdrawn, removed or lapsed. The learned High Court judge had decided that the respondent had a caveatable interest in the said property which was based on the tenancy agreement and that it was not frivolous or vexatious. Aggrieved by the decision, the appellants filed the present appeal. The issue for determination was whether the caveat lodged by the respondent ought to be removed.

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Held, allowing the appeal and setting aside the decision of learned judge with costs of RM20,000:

(1) Based on a perusal of s 173 of the Land Code, it is apparent that one of the instruments by virtue of which a caveat is allowed to be lodged by any person who claims to be beneficially interested in any land is an unregistered agreement (see para 6).

(2) The tenancy agreement had expired on 31 December 2012 when this action was commenced on 13 June 2016, it was clear that the tenancy agreement had already expired three and a half years before that date. In this regard, there was no longer a valid tenancy agreement on the date this action was commenced. It necessarily followed that there was no caveatable interest available to the respondent. The expiry of the tenancy agreement did not permit the caveat to remain (see para 8).

(3) The respondent did not acquire any legal interest under the unregistered tenancy agreement which was not further executed for the purpose of registration. The unregistered tenancy agreement was undeniably for a term in excess of one year. Under s 158 of the Land Code, it was mandatorily required that such tenancy agreement must be executed in the prescribed memorandum of sublease in Form L for the purpose of registration if the land was intended to be subleased for any period exceeding a year. This was a mandatory stipulation under the law which in this case there was clearly no compliance with such requirement (see paras 9–10).

(4) The words unregistered agreement in s 173 of the Land Code could not mean the unregistered tenancy agreement since it was not entered in accordance with s 158 of the Land Code. An unregistered agreement within the contemplation of s 173 must be one which is validly entered agreement. There was therefore in this situation no legal interest to be caveated, the respondent was in no position to claim to have a beneficial interest in the said property. As there was no legal interest acquired by the respondent, the respondent therefore did not have a caveatable interest against the appellants who were the registered proprietors of the said property. It followed that the caveat lodged by the respondent was illegal and ought to be removed (see paras 11–12).

[Bahasa Malaysia summary

Kes ini berkaitan dengan saman pemula yang difailkan oleh perayu memohon untuk beberapa pengisytiharan berkaitan dengan satu instrumen kaveat yang didaftarkan oleh responden pada satu bahagian tanah berserta dengan bangunan di atasnya ('harta tersebut') yang mana perayu memohon untuk: (a) satu deklarasi bahawa instrumen kaveat yang didaftarkan oleh responden diisytiharkan sebagai batal dan tidak sah; (b) satu deklarasi bahawa responden tidak mempunyai kepentingan yang boleh dikaveatkan atas harta tersebut; (c) satu deklarasi bahawa kaveat tersebut adalah salah atau didaftarkan tanpa sebab munasabah; dan (d) ganti rugi untuk kerugian yang dialami oleh perayu

untuk kemasukan salah kaveat tersebut. Fakta kes adalah bahawa kedua-dua perayu pemilik bersama berdaftar hartanah tersebut dan mereka telah memasuki satu perjanjian penyewaan dengan responden untuk tempoh lima tahun, namun, perjanjian tersebut tidak didaftarkan dengan badan berkuasa di bawah Kanun Tanah (Cap 81) ('Kanun Tanah'). Kemudiannya hartanah tersebut telah dirosakkan oleh kebakaran dan sejak itu, responden tidak membayar cukai bulanan kepada perayu. Satu setengah tahun selepas kebakaran tersebut, responden meneruskan dengan mendaftarkan satu kaveat peribadi terhadap hartanah tersebut dan mengatakan bahawa dia mempunyai kepentingan dalam hartanah tersebut berlandaskan perjanjian sewaan yang dipersoalkan dan melarang pendaftaran apa-apa pemindahan atau apa-apa urusan sehingga mana ianya ditarik balik, dikeluarkan atau luput. Hakim mahkamah tinggi terpelajar memutuskan bahawa responden mempunyai kepentingan yang boleh dikaveatkan dalam hartanah tersebut berdasarkan perjanjian sewaan tersebut dan ianya tidak remeh dan menyusahkan. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan ini. Isu untuk ditentukan adalah sama ada kaveat yang didaftarkan oleh responden sepatutnya dikeluarkan.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan hakim terpelajar dengan kos RM20,000:

(1) Berdasarkan penelitian s 173 Kanun Tanah, adalah jelas bahawa salah satu instrumen berdasarkan satu kaveat yang dibenarkan untuk didaftarkan oleh mana-mana individu yang mengatakan mempunyai kepentingan dalam apa-apa tanah adalah satu perjanjian yang tidak berdaftar (lihat perenggan 6).

(2) Perjanjian penyewaan telah tamat pada 31 Disember 2012 yang mana tindakan ini dimulakan pada 13 Jun 2016, adalah jelas bahawa perjanjian penyewaan yang telah luput tiga tahun setengah sebelum tarikh tersebut. Dalam perkara ini, tiada lagi satu perjanjian penyewaan yang sah pada tarikh tindakan ini dimulakan. Oleh itu, tiada kepentingan yang boleh dikaveatkan yang dimiliki oleh responden. Peluputan perjanjian penyewaan tidak membenarkan kaveat untuk terus didaftarkan (lihat perenggan 8).

(3) Responden tidak mempunyai apa-apa kepentingan undang-undang di bawah perjanjian penyewaan tidak berdaftar yang tidak dilaksanakan secara lanjut untuk tujuan pendaftaran. Perjanjian penyewaan yang tidak berdaftar adalah jelas untuk tempoh lebih satu tahun. Di bawah s 158 Kanun Tanah, adalah keperluan wajib bahwa perjanjian penyewaan tersebut mesti dilaksanakan dalam bentuk memorandum pajakan kecil dalam Borang L untuk tujuan pendaftaran sekiranya tanah tersebut bertujuan untuk di buat pajakan kecil untuk apa-apa tempoh melebihi satu tahun. Ini merupakan keperluan wajib di bawah undang-undang

A yang mana dalam kes ini tiada kepatuhan dengan keperluan tersebut (lihat perenggan 9–10).

(4) Perkataan perjanjian tidak berdaftar di bawah s 173 Kanun Tanah tidak boleh membawa maksud bahawa perjanjian penyewaan tidak berdaftar B memandangkan ianya tidak didaftarkan selaras dengan s 158 Kanun Tanah. Perjanjian yang tidak berdaftar dalam pandangan s 173 adalah satu perjanjian yang dimasukki secara sah. Dalam keadaan ini, oleh itu, tiada keadaan yang mana kepentingan undang-undang perlu dikaveatkan, responden tidak mempunyai kepentingan yang boleh C dikaveatkan terhadap perayu yang merupakan pemilik berdaftar hartanah tersebut. Oleh itu, kaveat yang didaftarkan oleh responden adalah tidak sah dan harus dikeluarkan (lihat perenggan 11–12).]

Notes

D For cases on removal, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2771–2774.

Cases referred to

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)
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Legislation referred to

Land Code (Cap 81) ss 119(1), (2), (3), 158, 161, 173, 179, Part VII, First Schedule, Form L

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Appeal from: Originating Summons No BTU-24NCvC-7/6 of 2016 (High Court, Bintulu)

Tai Choi Yu (Tai Choi Yu & Co Advocates) for the appellant.
Henry Ling Kuong Meng (Ling & Wong Advocates) for the respondent.
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Idrus Harun JCA (delivering judgment of the court):

[1] By an originating summons dated 13 June 2016, the appellants herein, qua the plaintiffs in the court below, apply, inter alia, for:
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(a) a declaration that the caveat instrument lodged by the respondent, who is the defendant in the High Court, against all the parcel of land together with the building thereon and appurtenances thereof containing an area of 143.1 sqmt and described as Lot 437 Block 22 Buan Land District I ('the said property') at the Bintulu Land Registry Office on 30 April 2010 be declared null and void and be removed and/or lifted;

(b) a declaration that the respondent has no caveatable interest on the said property;

(c) a declaration that the said caveat was wrongful and/or lodged without reasonable cause; and

(d) compensation for damages sustained by the appellants for wrongful entry of the caveat without reasonable cause under s 179 of the Land Code (Cap 81) ('the Land Code') be assessed by the court and be paid by the respondent to the appellants.

[2] The application is supported by three affidavits affirmed by the first appellant on 16 June 2016, 21 July 2016 and 18 August 2016. The respondent on the other hand affirmed two affidavits dated 13 July 2016 and 15 August 2016 to oppose the application. As far as we have been able to discern from the aforementioned affidavits, the indisputable facts clearly show that both appellants are the registered co-proprietors of the said property and they had entered into a tenancy agreement with the respondent with respect to the said property for a period of five years commencing from 1 January 2008–31 December 2012 at the monthly rental of RM1,100. The said property has one unit of a double storey terraced building for commercial and residential purposes. The agreement was not registered with the relevant authority under the Land Code.

[3] In the subsequent event which transpired, the said property, was substantially damaged by fire circa 5 November 2008. As from 5 November 2008, the respondent did not pay the monthly rental to the appellants. On 30 April 2010, about one and a half years after the fire, the respondent proceeded to lodge a private caveat against the said property pursuant to s 173 of the Land Code. In the said caveat, the respondent, as the caveator, claims to be beneficially interested in the said property by virtue of the tenancy agreement in question and forbids the registration of any transfer or other dealings affecting the same until it is withdrawn, removed or lapsed in accordance with the provisions of the Land Code. It is significant to note that the validity of the said tenancy agreement for the period of time stated therein had expired on 31 December 2012.

[4] The learned judge in his decision, having considered the evidence adduced, came to the finding that the respondent had caveatable interest in the said property and that his claim of caveatable interest based on the tenancy agreement in question was not frivolous or vexatious.

[5] Before this court, the question which arises for our determination is whether the caveat lodged by the respondent ought to be removed. This then brings us to the provision contained in the Land Code relating to caveat that is germane to this appeal. The said relevant provision is found in s 173 of the Land Code and for the purpose of this appeal we shall quote the provision applicable to the subject under consideration:

173 Any person —

(a) claiming to be entitled to or to be *beneficially interested in any land*, estate or interest under this Code *by virtue of any unregistered agreement* or other instrument or transmission, or of any trust express or implied or otherwise howsoever, or by virtue of license issued pursuant to section 65B of the Forest Ordinance [Cap 126 (1958 Ed)] for the establishment of a planted forests;

(b) ...

(c) ...

may at anytime lodge with the Registrar a caveat in Form O in the First Schedule. (Emphasis added.)

[6] The irrefragable fact is that the impugned caveat was lodged pursuant to the above provisions. The point that we want to make is that, from a perusal of s 173 itself, it is apparent that one of the instruments by virtue of which a caveat is allowed to be lodged by any person who claims to be beneficially interested in any land is an unregistered agreement. It ought to be mentioned that in this case, as aforementioned, the tenancy agreement is an unregistered document. This is further made manifest when the first appellant in his affidavit in support adopts the position that the tenancy agreement is not registered as an interest on the said property under the Land Code. We will deal with the pertinent issue of an unregistered document in due course.

[7] For the respondent it is contended that the appellants have full knowledge of the terms of the sublease or tenancy agreement which are expressly provided in Part V(7) thereof that when the sublessors namely the appellants desire to sell, transfer or dispose of the said property to a third party, the option to purchase must first be given to the sublessee namely the respondent. Likewise, Part V(10) gives priority to the respondent to take the said property for a tenancy for a further term. We note that these terms posit a basis for the respondent to argue that he has a caveatable interest in view of the binding nature of the option. It is also the respondent's position that since the tenancy agreement still subsists and the appellants do not terminate it, the application for removal of the caveat is not bona fide. It is not for the appellants to take advantage of their own faults or defaults and to renege from the binding contract and then say that it 'is also trite and settled law that an option granted in a contract is not a caveatable interest in law' when and where the law clearly says otherwise. Another argument urged on behalf of the respondent is that since the appellant did not ever rescind or terminate the tenancy agreement after the outbreak of the fire or refund the deposit, nor did the respondent desire to terminate the contract or ask for the refund of the said deposit as he wished to resume the remaining period of 50 months of the tenancy, the common intention of the parties is that the tenancy of the said property was

suspended until it 'shall be restored and rendered fit for occupation and use' pursuant to Part V(3)(a) of the tenancy agreement. Therefore, it is submitted, given that the tenancy agreement is still valid although it was suspended after the fire, the respondent is lawfully entitled or claiming to be entitled to an interest in the said property and the respondent has lodged the caveat to protect the said interest.

[8] By way of emphasis, it is necessary to draw attention to the fact that the impugned caveat was not lodged very soon after the fire. As stated earlier in our judgment, it was lodged almost one and a half years after the property was severely damaged by the fire. The tenancy agreement expired on 31 December 2012. Thus, when this action was commenced on 13 June 2016, it is clear to this court that the tenancy agreement had already expired three and a half years before that date. It will be legally correct for this court to hold that in this regard there is no longer a valid tenancy agreement at all on the date that this action was commenced. That being the case, it necessarily follows that there is no caveatable interest available to the respondent. His position is no more than and indeed is reduced to just a fictitious and non-existent tenant. This supervening event in our opinion clearly does not justify the continued existence or maintenance of the caveat on the register. The expiry of the tenancy agreement does not permit the caveat to remain, instead such caveat ought to be removed. We make this finding as it is obvious and trite that this court is required to consider that in law there is in effect no longer any caveatable interest in the said property capable of statutory protection. Under the circumstances, it is plain that the instant case is eminently one which requires the learned judge to exercise his discretion to order for the removal of the impugned caveat. Our conclusion, if correct, must dispose of this appeal. Nevertheless, in case it be wrong, we turn to the remaining principal grounds raised in this appeal.

[9] That brings us to the significant argument that has been urged upon us by the appellants' counsel to the effect that the respondent did not acquire any legal interest from or by virtue of the tenancy agreement which was not registered and not executed in accordance with the prescribed Form L under the Land Code. One thing which is very clear is that under the Torrens System of registration which is followed and applied in Sarawak pursuant to the Land Code, the respondent does not acquire any legal interest under the unregistered tenancy agreement which is not further executed for the purpose of registration by way of a memorandum of sublease in Form L as prescribed in the First Schedule to the Land Code. The unregistered tenancy agreement in the instant case is undeniably for a term in excess of one year commencing on 1 January 2008 and expiring on 31 December 2012. Under s 158 of the Land Code, it is mandatorily required that such tenancy agreement must be executed in the prescribed memorandum of sublease in Form L for the purpose of registration

if the land is intended to be subleased for any period exceeding one year.

[10] It is instructive to reproduce from the Land Code the provisions of s 158:

> 158 Form of Sublease
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> When any land is intended to be subleased for any term exceeding one year, the proprietor and the sublessee shall execute for the purpose of registration a memorandum of sub-lease in Form L in the First Schedule, which memorandum shall give such description of the land as may be necessary to identify the same and shall refer to any entry in the Register relating thereto. Any such sub-lease may also include an agreement by the sub-lessee that he will insure and keep the property insured against loss or damage by fire and also such other conditions as may have been agreed to by the parties.

From our careful reading of the section itself and the indisputable evidence that we could discern, we are certain as indeed day follows night that both the appellants, as the proprietor of the said property, and the respondent, as the sublessee, are required to execute a memorandum for sublease in Form L for the purpose of registration of the sublease or tenancy. This is without doubt a mandatory stipulation under the law of which in this case there was clearly no compliance with such requirement. Section 158 provides for a specific mode of registration of a sublease for any term exceeding one year and such sublease must be in the form of a memorandum of sublease as prescribed in Form L.

[11] The words 'unregistered agreement' in s 173 of the Land Code, in our judgment, could not have meant the unregistered tenancy agreement in the instant case since it was not entered into in accordance with s 158 of the Land Code. An unregistered agreement within the contemplation of s 173 must be one which is validly entered agreement such as a sale and purchase agreement involving a land or tenancy agreement for a term not exceeding one year which is valid without registration under s 161 of the Land Code, by virtue of which it could be said that a person could claim to be beneficially interested in the land so that he may at any time lodge a caveat with the Registrar. The result is therefore that it is not manifestly possible legally for such sublease to be recognised and enforced and for the respondent to claim to be beneficially interested in the said property for the purpose of any lodgement of caveat as the unregistered tenancy agreement dated 19 March 2008 entered into between the appellants and the respondent is in law not effectual to pass any interest therein to the respondent until it has been registered. There was therefore in this situation no legal interest to be caveated. For these reasons, the respondent is in no position to claim to be beneficially interested in the said property.

[12] It follows that without legal interest acquired by the respondent under

the unregistered tenancy agreement, the respondent does not have a caveatable interest against the appellants who are the registered proprietors of the said property, and therefore the caveat lodged by the respondent is illegal and ought to be removed. We would be obliged to state that the learned judge erroneously held that the respondent had a caveatable interest by virtue of the unregistered tenancy agreement which fell within the scope of s 173 of the Land Code. Legally, the respondent could not lodge the said caveat in assertion of the rights under the ineffectual unregistered tenancy agreement. This is clearly provided in the Land Code in s 119(1) which reads:

> 119 Instrument not effectual until entry in Register
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> (1) *No instrument shall be effectual to pass any* land or any *interest therein*, or render any land liable as security for the payment of money, until it has been registered in accordance with this Part. (Emphasis added.)

[13] Every court of competent jurisdiction, including the court below, is mandatorily bound to treat the ineffectual unregistered tenancy agreement as ineffectual until it has been registered in accordance with the provisions of the Land Code. Section 119(3) of the Land Code on this point deals with the effect or treatment of an ineffectual document such as the unregistered tenancy agreement herein. This is what it provides:

> 119(3) An instrument which, by virtue of this section, is ineffectual shall be treated as ineffectual by every court of competent jurisdiction until it has been registered in accordance with the provisions of this Code, notwithstanding the existence of a right to specific performance.

By reason of the clear and peremptory provisions of s 119(1) and (3) of the Land Code, we accede to the argument urged for the appellants that the respondent did not acquire any interest whatsoever, whether legal or caveatable, against the said property as the tenancy agreement was not registered in accordance with the law as provided under Part VII of the Land Code. Such agreement is pro tanto ineffectual to the extent that it does not pass any interest in the said property that would entitle the respondent to claim that he has a caveatable interest therein or enforce as against the appellants, qua the registered proprietors, any claim to any interest affecting the said property.

[14] This is further made manifest when one considers the provision in s 119(2) of the Land Code, also couched in peremptory language, which prohibits the court from recognising, assisting, enforcing or protecting, as against a registered proprietor, any such claim to any interest affecting land which is founded upon or arises from any instrument which by reason of sub-s (1) is not effectual. Section 119(2), we apprehend, dictates that the court must uphold and apply the law, any deviation from the peremptory stipulation in these provisions will render any decision therefrom as being ultra vires the

Land Code. We now reproduce s 119(2) of the Land Code for easy reference:

> 119(2) *No court* of competent jurisdiction *shall recognize, assist, enforce or protect, as against a registered proprietor* or a person claiming though or under a registered proprietor, *any claim* to the possession, enjoyment or occupation of any land, or *any interest affecting land, which is founded upon or arises from any instrument which by reason of section (1) is not effectual*:
>
> Provided that *nothing in this subsection shall operate to defeat a claim to damages or for specific performance founded upon, or arising from, such an instrument*. (Emphasis added.)

[15] However, the respondent is not left without any rights as the proviso to in s 119(2) of the Land Code is specifically enacted to allow recourse for remedies for a claim to damages or for specific performance. Since the said tenancy was not registered in accordance with the law, it is plain that the respondent, if he chooses to pursue further under the unregistered tenancy agreement, must file a claim for damages or for specific performance against the appellant in the High Court and if the respondent succeeds before the said High Court, then to have the decision registered against the said property under the Land Code. However, no such claim for damages or specific performance has been instituted by the respondent in the court. Even so, in our view, the respondent will find it extremely difficult or near impossible to succeed in the face of the irrefragable fact of the expiry of the unregistered tenancy agreement which consequently renders the same non-existent. It ought to be emphasised that without a judgment for damages or specific performance the respondent has no interest whatsoever to caveat the said property and the respondent's caveat registered at the Bintulu Land Registry on the 30 April 2010 against the said property must be removed or lifted forthwith. The respondent has his rights in personam to claim for damages or specific performance yet he did not avail himself of such right. For these reasons, the respondent's argument that he has a caveatble interest in the said property which entitles him to lodge and maintain the impugned caveat is wholly unmeritorious and manifestly fallacious. On that basis, there is certainly force in the appellant's contention that the caveat ought not to be allowed to remain on the register.

[16] The learned judge, we observe, did not address his mind to the issue of an unregistered tenancy agreement at all. The failure to do so constitutes a serious misdirection to warrant our appellate intervention. His Lordship instead veered off course when he embarked on a consideration of the evidence that there was an outstanding period of 50 months under the tenancy and having relied on Part V(3)(a) of the tenancy agreement, held that the payment of rental was suspended after the fire and the respondent had waited for the appellants to repair and restore the said property to be fit for him to continue the remaining period of the tenancy. The respondent too took a similar stance

in his submission. This argument of the respondent and the finding made by the learned judge involve the clear fallacy as it then begs the question regarding the legitimacy of such an argument and finding in the face of the indisputable clear evidence that the tenancy has come to an end after the expiry of the tenancy agreement and that the same was not executed in accordance with the law. The argument that the respondent would suffer injustice completely ignores and rides roughshed over the fact that the court could not enforce, recognize or protect as against the appellants, being the registered proprietors of the said property, the respondent's claim to the interest affecting the said property. Indeed the appellants on the contrary would suffer grave injustice if this court were to allow the caveat to remain on the register eight years after its lodgment.

[17] The next findings by the learned judge concern the retention of the deposit of RM3,300 by the appellants which was paid by the respondent and the payment of fire compensation of RM85,000 from the insurance company for the damage caused to the said property in the course of the fire. In our judgment, it was wrong for the learned judge to consider the deposit of RM3,300 as it was open to the respondent to claim the same from the appellants which the respondent never did. As for the insurance compensation of RM85,000, we would say that it is equally wrong for the learned judge to consider it as this compensation rightly belonged to the appellants who bought and paid for the insurance and the premiums.

[18] The learned judge in his judgment dealt with the issue of first option to purchase the said property in the event the appellants desired to sell or transfer the same. It cannot be denied that pursuant to Part V(7) of the tenancy agreement, the option must first be given to the respondent and likewise pursuant to Part V(10) thereof, it was agreed that the appellants should give priority to the respondent. By virtue of being an option holder, the learned judge held that the respondent had a caveatable interest in the said property. The respondent in his affidavits affirmed on 13 July 2016 and 15 August 2016 and submission adopted the position in a similar vein. Such position and finding overlook the fact that there is undoubtedly no longer a valid tenancy agreement as it had already expired, and as we have earlier found, it was not made in accordance with the law. That being the case, it is wishful thinking to imagine or assume, instead of referring to the evidence and the law and accepting reality, that as an option holder he has caveatable interest in the said property. In our judgment, a non-existent tenancy agreement or an ineffectual tenancy agreement cannot give any right to the respondent such as a caveatable right or interest on the said property as against the appellants being the registered proprietors thereof. In any event, it would be erroneous for the learned judge to consider the option as it was never exercised nor called into play because the said property was never sold nor rented out to anyone. We

must however mention, lest it be said that we overlook it, that the appellants did state in their affidavit that they wanted to sell the said property but the intended sale failed or was aborted due to the caveat.

[19] The Privy Council in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 in the judgment of Lord Diplock clearly explained the nature of the onus that lies upon the caveator in an application by the caveatee for the removal of a private caveat. This is what His Lordship there said at p 215B:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried: and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

[20] In an action in which the appellants seek the removal of the respondent's caveat lodged against the said property, we are constrained to hold, on the strength of the evidence available before this court and for the reasons that we have given, that the respondent in the end fails to satisfy the court or persuasively prove his claim to an interest in the said property does raise a serious question to be tried. Mindful of the onus on the respondent that, as the caveator, he must justify the continued existence and maintenance of the caveat on the balance of convenience, we find that the respondent also fails to show that it would be better to maintain status quo. In this case, in our judgment, there is absolutely no action pending nor is there a scintilla of proof of imminent disposal of the said property. The learned judge misdirected himself in holding that the respondent had a caveatable interest in the said property. His Lordship's evaluation of the evidence was not justified and we find strong grounds for this court to interfere with the way in which his discretion was exercised. We find no difficulty whatsoever in allowing the appeal and setting aside the decision of the learned judge. In the upshot, we make an order in terms of the appellants' originating summons in prayers (1)–(4). As regards prayer (4), the case is remitted back to the High Court for compensation to be proved and assessed. The appellants are given costs of here and in the court below in the sum of RM20,000 subject to the payment of allocatur fee. The deposit is ordered to be refunded to the appellants.

Appeal allowed and decision of learned judge set aside with costs of RM20,000.

Reported by Izzat Fauzan